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NO. 757

IN THE

Supreme Court of the United States

October Term, 1968

FREDDIE JOE WELCH

AND

PAUL L. TUGWELL, *Petitioners*

v.

GERALD B. LEAVEY,
DEPUTY COMMISSIONER, ET AL,
Respondents

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS, ATLANTIC & GULF STEVEDORES, INC., YOUNG & COMPANY OF HOUSTON AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

TO THE HONORABLE JUDGES OF SAID COURT:

The Petitioners[1] in this case seek a review of fact findings made by the Deputy Commissioner in his Compensation Orders under the Longshoremen's Act in which he found:

1. Hereafter also referred to on occasions as 'Tugwell" and "Welch".

> That neither Tugwell nor Welch had a loss of wage-earning capacity as a result of their injuries sustained while working as longshoremen, although both have a permanent partial disability to their body generally from a medical standpoint.

As the Longshoremen's Act expressly provides that compensation shall be paid only for a loss of wage-earning capacity and not on the basis of some medical disability to the body generally, both the District Court and the Court of Appeals below affirmed these fact findings by the Deputy Commissioner in both Tugwell and Welch.

OPINIONS BELOW

For the convenience of the Court, the opinion of the Court of Appeals below which is reported at 397 F.2d 189 is printed as Appendix A to this brief.[2]

Although Petitioners are correct in saying there was no written opinion from the District Court below, that Court did make docket entries, and although they are not particularly helpful, for the sake of completeness, so far as applicable to the matters raised in the Petition for a Writ of Certiorari, these docket entries are printed as Appendix to this brief.[3]

STATUTES INVOLVED

The pertinent portions of the Longshoremen's & Harbor Workers' Compensation Act which are involved are found in Section 902(10),[4] Section 908(c)[5] which covers com-

2. Appendix A, *infra*, pages 1A to 7A.

3. Appendix B, *infra*, page 8A.

4. 33 U.S.C.A. §902(10).

5. 33 U.S.C.A. §908(c).

pensation for "permanent partial disability" in 22 separate subdivisions, and Section 908(h)[6] which specifically defines the term "wage-earning capacity" as used in subdivision (21) of Section 908(c).[7] Where pertinent here, these provisions read as follows:

1. Section 902 (33 U.S.C.A. 902)

> "(10) *Disability" means incapacity* because of injury *to earn the wages* which the employee was receiving at the time of the injury *in the same or any other employment."* (Emphasis supplied)

2. Section 908(c) (33 U.S.C.A. 908(c))

. . . . . .

> "(21) Other Cases: In all other cases (injuries to body generally) in this class of disability (permanent partial) the *compensation shall be* 66-2/3 percentum of *the difference between his average weekly wages (prior to the injury) and his wage-earning capacity thereafter in the same employment or otherwise,* payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest." (Parenthetical expressions and emphasis supplied)

3. Section 908(h) (33 U.S.C.A. 908(h))

. . . . . .

> "(h) The wage-earning capacity of an injured employee under subdivision (c) (21) of this section (Section 908) . . . . (1) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity:

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6. 33 U.S.C.A. §908(h).

7. 33 U.S.C.A. §908(c)(21).

(2) *Provided, however,* that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future." (Italics in statute, parenthetical reference to Section 908 and numerals (1) and (2) added.)

REASONS FOR DENYING THE WRIT

1.

The decision of the Court of Appeals below was compelled by three separate and distinct provisions in the Longshoremen's Act which require a loss of wage-earning capacity before compensation can be awarded for a medical disability.[8]

2.

Contrary to the contentions made in the Petition, the decision of the Court of Appeals below is not in conflict with the decisions referred to from the Courts of Appeal for the Second[9] and Fourth Circuits,[10] but in fact is entirely consistent with them and all other decisions that have considered similar questions.[11]

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8. See full discussion, *infra*, pages 8 to 10.

9. *Travelers Insurance Company v. McLellan*, 2 Cir. 1961, 288 F.2d 250.

10. *Ennis v. O'Hearne*, 4 Cir. 1955, 223 F.2d 755.

11. See full discussion, *infra*, pages 10 to 13.

3.

The findings made by the Deputy Commissioner were ultimate fact findings and clearly met the standards of completeness without minutia required of administrative fact findings, and the holding of the Court below to this effect is not in conflict with this Court's opinion in the case relied on by Petitioners.[12]

ADDITIONAL STATEMENT OF THE CASE

1. As to Tugwell

While there was a conflict in the medical evidence presented before the Deputy Commissioner, his order found that Tugwell had a "permanent partial disability equivalent to 20% loss of use of the body as a whole, including such part thereof as may have been caused by aggravation to his pre-existing congenital anomaly.[13] The Deputy Commissioner found that following his injury of July 12, 1958 Tugwell returned to full time employment as a longshoreman on November 2, 1958 and for approximately the next six years Tugwell's actual earnings exceeded his actual earnings prior to the injury by approximately $99.00 per week. By the year 1964 his actual earnings as a longshoreman had almost doubled those he was earning prior to his injury.[14] Based on this evidence

12. See full discussion, *Infra*, pages 13 to 15.

13. Appendix A, Petition for Writ of Certiorari, page 3a.

14. Somewhat more in detail the specific facts found by the Deputy Commissioner so far as pertinent to the petition were as follows:

1. Tugwell's average weekly wage at the time of the injury was $146.36, which would be $7,610.72 per year. (Finding No. 3).
2. Tugwell has a permanent partial disability equivalent to 20 per cent loss of use of the body as a whole, including such

relating to his actual wage-earning capacity and the other evidence in the record such as the affirmative testimony of Dr. George Lane that Tugwell "had no disability in terms of loss of earning capacity,"[15] the Deputy Commissioner specifically found as follows:

> "As a consequence of his record of substantially increased earnings since November 2, 1958, and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, it is accordingly herewith determined that the claimant has sustained no loss of wage earning capacity as a consequence of his injury of July 12, 1958, within the meaning and intention of the Longshoremen's & Harbor Workers' Act."[16]

---

part thereof as may have been caused by aggravation to his pre-existing congenital anomaly (Finding No. 6).

3. Maximum improvement occurred on or about May 5, 1961 (Finding No. 7).
4. Tugwell has had the following earnings since his injury: From November 2, 1958, to December 31, 1958, he earned $1,664.98, averaging $185.00 per week, or an excess of $38.64 per week above his average weekly wage prior to injury. His earnings after December 31, 1958 were as follows:
   For the year 1959, $10,790.41;
   For the year 1960, $13,778.26;
   For the year 1961, $12,262.74;
   For the year 1962, $12,452.75;
   For the year 1963, $12,344.67;
   For the year 1964, $14,926.99.
   Tugwell's average weekly wage for the consecutive six year period above shown was $245.37, or an excess per week of $99.01 above his average weekly wage of $146.36 prior to injury (Finding No. 8).
5. From January 1, 1965 to March 8, 1965 (less the seven week strike period) Tugwell's average weekly wage was $230.04, or an excess of $83.68 per week above his average weekly wage prior to injury (Finding No. 9).

Appendix A, Petition for Writ of Certiorari, pages 2a to 4a.

15. Transcript in Court below, page 152.

16. Appendix A, Petition for Writ of Certiorari, page 4a.

2. As to Welch

The Deputy Commissioner found that as a result of his injury of November 24, 1961, Welch sustained a "permanent partial disability determined to be not less than five percent nor in excess of ten percent for loss of use of the body as a whole.[17] The Deputy Commissioner further found that Welch's disability became permanent on May 30, 1963, that he continued to work as a longshoreman with no loss of wages from that date to the date of the hearing and that his average weekly wages after that date were in excess of the pre-injury earnings.[18] Based upon all of the evidence in the record, the Deputy Commissioner found that Welch had sustained no loss of wage-earning capacity after May 30, 1963 in the following language:

> "In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were equal to or in excess of his average weekly wage prior to his injuries, and considering the degree or percentage of his physical impairment, his usual employment and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961."[19]

With this brief explanation of the facts, which fully supported the Deputy Commissioner's ultimate fact finding that neither Tugwell nor Welch sustained a loss of wage-

17. Appendix B, Petition for Writ of Certiorari, page 10a.

18. Ibid.

19. Ibid.

earning capacity as required by the Longshoremen's Act, it becomes obvious why both the District Court and the Court of Appeals below affirmed the Deputy Commissioner's Compensation Order.

ARGUMENT

1.

LONGSHOREMEN'S ACT REQUIRES LOSS OF WAGE-EARNING CAPACITY

Petitioner's primary contention in this Court, as it was in the Court of Appeals below, is that the Deputy Commissioner's findings that Tugwell and Welch had a permanent partial disability to the body generally, compelled a finding that they were entitled to additional compensation benefits, even though neither of them had any loss of earnings or loss of wage-earning capacity as expressly required by the Longshoremen's Act.

This contention completely ignores three separate and distinct provisions in the Longshoremen's Act which, as the Court of Appeals for the Second Circuit has said, clearly impose "upon the Deputy Commissioner and the reviewing courts the duty to evaluate the extent of a claimant's disability in economic rather than medical terms".[20] These three separate and distinct provisions are:

1. Section 902(10) which defines the term "disability" in these terms:

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20. *John W. McGrath Corporation v. Hughes*, 2 Cir. 1961, 289 F.2d 403, at page 405.
Accord: *Owens v. Traynor*, D.C. Md. 1966, 274 F.Supp. 770, at page 774, affirmed 4 Cir. 1968, 396 F.2d 783, cert. denied, November 25, 1968, No. 529, 37 U.S. Law Week 3192. *Miller v. O'Hearne*, D.C. Md. 1960, 181 F.Supp. 105.

"(10) 'Disability' means *incapacity* because of injury *to earn the wages* which the employee was receiving at the time of the injury *in the same or any other employment.*" (Emphasis supplied) [33 U.S.C.A. 902(10)]

2. Section 908(c) which expressly provides that in permanent partial disability cases to the body generally

"the compensation *shall* be . . . .

"the difference between his average weekly wages (prior to his injury) and *his wage-earning capacity thereafter* in the same employment or otherwise." (Emphasis and parenthetical expression added) [33 U.S.C.A. 908(c) (21)]

Thus by statutory definition compensation is payable for permanent partial disability to the body generally only if this disability produces an "incapacity to earn" wages or a loss of wage-earning capacity. The Longshoremen's Act does not stop here, however, but goes even further and defines what factors are to be considered in determining the "wage-earning capacity" of an employee in cases involving permanent partial disability to the body generally:

3. Section 908(h) defines "wage-earning capacity" as used in Section 908(c) (21) in the alternative:

(a) First, "wage-earning capacity *shall* be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity," (Emphasis supplied)

or

(b) Second, "if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Deputy Commisioner may, in the interest of justice, fix such wage earning capacity as shall

> be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future." [33 U.S.C.A. 908(h)]

The Deputy Commissioner used the first definition above in Tugwell and the second definition above in Welch.

Thus, the Longshoremen's Act makes it perfectly clear in three separate places that a medical disability to the body generally, such as is involved in both Tugwell and Welch, are to be compensated only if this medical disability creates an "incapacity to earn wages" they were earning at the time of the injury "in the same or any other employment."

2.

OPINION BELOW NOT IN CONFLICT WITH OTHER COURTS OF APPEAL

Neither of the cases relied on by Petitioners in their attempt to demonstrate a conflict with the decisions of other Courts of Appeal are in conflict with the holding of the Court below which followed this clear and unambiguous Congressional mandate:

1. Petitioners assert a conflict exists with the *Ennis* case[21] from the Court of Appeals for the Fourth Circuit but *Ennis* does not hold that a medical disability without more requires the payment of compensation as Petitioners contend and in fact does

21. *Ennis v. O'Hearne*, 4 Cir. 1955, 223 F.2d 755.

not either involve or discuss this issue. All that the Court of Appeals for the Fourth Circuit held in *Ennis* was that the matter had to be remanded to the Deputy Commissioner for a new hearing with leave to the parties to introduce new evidence because the Deputy Commissioner's Compensation Order denying compensation was not supported by any evidence in the record. It does not discuss in any way the question of whether under the three provisions of the Longshoremen's Act discussed above a person is entitled to compensation when he has no loss of wage-earning capacity as a result of the injury.

In fact, a recent decision of the Court of Appeals for the Fourth Circuit demonstrates quite clearly that that Court would reach precisely the same result in Tugwell and Welch as that reached by the Court of Appeals below.[22] In *Owens* the Court of Appeals for the Fourth Circuit had a case that involved an injury which required an operation on the employee's back and resulted in a 25% permanent partial medical disability.[23] The Deputy Commissioner denied compensation for this medical disability because the employee had not sustained any loss of wage-earning capacity as a result of it, which is a pre-requisite to an award of compensation under the Longshoremen's Act. This finding was affirmed by both the District Court and the Court of Appeals for the Fourth Circuit. Thus, the decision of the Court of Appeals for the Fourth Circuit in the *Owens* case which has specifically considered the same question involved in this petition, is in complete accord with the Court of Ap-

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22. *Owens v. Traynor*, 4 Cir. 1968, 396 F.2d 783, cert. denied, November 25, 1968, No. 529, 37 U.S. Law Week 3192.

23. The opinion of the Court of Appeals for the Fourth Circuit does not reflect this information, but it is shown in the opinion of the District Court, *Owens v. Traynor*, D.C. Md. 1966, 274 F.Supp. 770, at page 772.

peals below. The decision of the Court of Appeals for the Fourth Circuit in *Ennis* cannot be in conflict with either its own decision in *Owens* or the decision of the Courts of Appeals below in these cases since the question presented by the petition herein was not even involved or considered by it in *Ennis*.

2. Petitioners also assert that a conflict exists with the *McLellan* case[24] from the Court of Appeals for the Second Circuit. *McLellan* not only is not in conflict with the Court of Appeals below, but in fact makes it abundantly clear that it is a loss of wage-earning capacity only, which is compensable under the Longshoremen's Act, and that the Deputy Commissioner was correct in awarding compensation not for any "medical disability" but for the claimant's loss of wage-earning capacity, which is the statutory criteria. Thus, *McLellan* is entirely consistent with the decision of the Court of Appeals below in these cases, and clearly reflects that precisely the same result would have been reached by it had these cases been pending before it rather than in the Court of Appeals for the Fifth Circuit.

But if any possible doubt can exist from *McLellan* that the court of Appeals for the Second Circuit would reach the same result in the case as that of the Court of Appeals below, it is dispelled completely by the decision of the Court of Appeals for the Second Circuit in the *Hughes* case. In *Hughes* the Court of Appeals states affirmatively that the disability of a claimant under the plain provisions of the Longshoremen's Act must be evaluated "in economic rather than medical terms."[25]

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24. *Travelers Insurance Company v. McLellan*, 2 Cir. 1961, 288 F.2d 250.

25. *John W. McGrath Corporation v. Hughes*, 2 Cir. 1961, 289 F.2d 403, at page 405.

Thus, it is clear that both the Court of Appeals for the Second and Fourth Circuits are in full agreement with the holding of the Court of Appeals below that

> "It is well settled that this statutory framework commands the Commissioner to translate disability in a medical sense into economic disability within the meaning of the Act."[26]

If the medical disability does not produce any "economic disability", that is, a loss of wage-earning capacity, it is not compensable under the Longshoremen's Act, and the Court of Appeals below was correct in so holding.

3.

DEPUTY COMMISSIONER'S FINDINGS OF FACT ARE NOT INCOMPLETE

Petitioners contend that the findings of fact made by the Deputy Commissioner are not sufficiently specific because he did not make a finding as to whether their earnings subsequent to the injury fairly and reasonably represented their wage-earning capacity. Petitioners rely on this Court's decision in the *Automatic Canteen Company* case[27] and state that it is believed by them to be in conflict with the decision of the Court below in this case.

That the findings of the Deputy Commissioner in these cases are not the generalities condemned by this Court in *Automatic Canteen* can quickly be seen from this brief

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26. Appendix A, *infra*, page 4A.

27. *Automatic Canteen Co. v. Federal Trade Commission*, 1953, 346 U.S. 61, 97 L.Ed. 1454, 73 S.Ct. 1017.

quotation from Mr. Justice Frankfurter's opinion in that case:

> ". . . While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a Court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies, and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review. . . ."[28]

Certainly, no one would seriously contend that the Deputy Commissioner's findings in these two cases are "uncritical generalities" which "make it essentially impossible for" a Court "to determine what really lay behind the conclusions" which the Court below was reviewing.

As both the District Court and the Court of Appeals below hold, in Tugwell the only reasonable inference that can be drawn from the Deputy Commissioner's findings are that he considered that Tugwell's actual wages fairly and reasonably represented his wage-earning capacity since he found that these actual earnings demonstrated that he in fact had no loss of wage-earning capacity.

In Welch, it is also clear from the Deputy Commissioner's Compensation Order that the Deputy Commissioner did not consider that Welch's actual earnings sub-

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28. 346 U.S. 61, at page 81, 97 L.Ed. 1454, at page 1467.

sequent to the injury necessarily represented his wage-earning capacity. This is manifest from the fact that the Deputy Commissioner specifically resorted to and considered all of the factors contained in the second definition of wage-earning capacity contained in Section 908(h) of the Longshoremen's Act.[29] It is perfectly clear and obvious from the Compensation Order in Welch that the Deputy Commissioner used the second definition in that section of the Act in arriving at his determination that Welch had no loss of wage-earning capacity.

In effect, all the Petitioners' contention amounts to in this regard is that the Deputy Commissioner did not make fact findings in the precise language which Petitioners would have liked for him to use.

Surely the findings made by the Deputy Commissioner in these two cases adequately and clearly reflect precisely what basic facts he found, and even indicate as well that section of the statute on which he based his finding of no loss of wage-earning capacity in each of the cases.

To require any more of administrative hearing officers in their findings of fact would be to require them to make detailed evidentiary findings rather than the basic fact findings which are all that are reasonably necessary or that this Court has ever required.

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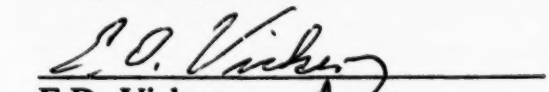
29. 33 U.S.C.A. §908(h).

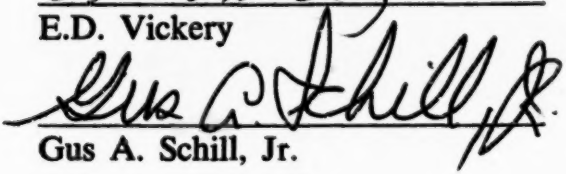
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,



E.D. Vickery



Gus A. Schill, Jr.

Ben L. Reynolds

Attorneys for Respondents, Atlantic & Gulf Stevedores, Inc., Young & Company of Houston and Texas Employers' Insurance Association

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon counsel for Petitioners, Mr. W. Jiles Roberts, 617 Americana Building, Houston, Texas 77002, and upon counsel for the Respondents Gerald B. Leavey and R. J. Shea, Deputy Commissioners, Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, Mr. Alfred H. Meyers and Mr. Arthur Bolstein, Attorneys, United States Department of Labor, Washington, D. C. 20530, and Honorable Morton L. Susman, United States Attorney, P. O. Box 61129, Houston, Texas 77061, by depositing two copies to each of them in a United States post office or mail box, with first class postage prepaid, air mail postage prepaid to all out of town addressees, properly addressed to their respective post office addresses as shown above on this the 23rd day of December, 1968.

E. D. Vickery

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24082

FREDDIE JOE WELCH and PAUL L. TUGWELL,
Appellants,

versus

GERALD B. LEAVEY, Deputy Commissioner, ET AL,
Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(July 10, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: In these consolidated appeals, two longshoremen challenge the adequacy of the Commissioner's compensation award. 33 U.S.C. §901 *et seq.* The case concerns the procedure that must be followed by the Commissioner in a partial-disability case in computing the impact of the injury on the worker's wage-earning capacity and the findings that must be made.

Appellant Tugwell was injured on July 12, 1958 when he slipped and fell while working on a ship. The Commissioner determined that as a result of the fall Tugwell suffered permanent-partial disability from an injury to the lower back.[1] He received a compensation award of $844.20 for the period from July to November 1, 1958; however, his claim for continuing compensation was denied. It was shown that Tugwell was promoted to a walking foreman after his injury and that his after-injury wages were considerably higher than his pre-injury wages. Based on this fact and the medical testimony, the Commissioner concluded that appellant suffered no economic loss after November 1, 1958. He specifically found that appellant's record of substantially increased earnings and his positively demonstrated ablity to earn higher wages indicated that he suffered no loss of earning capacity after that date.

Appellant Welch's injury occurred on November 24, 1961 when he slipped on some fertilizer and at the same time was struck by a load being swung by a crane which knocked him to the floor. He suffered a back injury from this mishap, but continued to work though he was partially disabled until May 30, 1963. The Commissioner concluded that although Welch was partially and permanently disabled he suffered no loss of earning capacity after May 30, 1963:

> In consideration, therefore, of the claimant's demonstrated ability to earn wages during a substantial period of his disability, which were

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[1]We reach Tugwell's compensation claim because we have determined in a companion case that he is not barred by collateral estoppel from seeking compensation under the Longshoremen's Act. *See Young & Company v. Shea,* 5th Cir. 1968, _____F.2d_____ [No. 24249, _____, 1968]

> equal to or in excess of his average weekly wage prior to his injuries, and considering the degree or percentage of his physical impairment, his usual employment and other factors and circumstances which might affect his capacity to earn wages in his disabled condition, including the effect of such disability as it may naturally be expected to extend into the future, it is determined that the claimant suffered no loss of wage-earning capacity subsequent to May 30, 1963, as a consequence of his injury of November 24, 1961.

Appellants contend that the Commissioner erred in failing to award compensation after these dates. We are convinced, however, that there is substantial evidence to support the holding that although Tugwell and Welch suffered permanent impairments from their injuries, they suffered no disability within the economic purview of the Longshoremen's Act after the dates set by the Commissioner.

In cases of permanent-partial disability, the statute dictates that for non-specific-member loss, the wage-earning capacity of the worker shall be the basis upon which compensation is awarded. Thus 33 U.S.C. §908 (c)(21) is controlling:

> (21) Other Cases: In all other cases in this class of disability (permanent and partial) the compensation shall be 66 2/3 percentum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but sub-

> ject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest.

The Commissioner determines "wage-earning capacity" by following section 908(h) of the Longshoremen's Act:

> The wage-earning capacity of an injured employee . . . (1) shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity; (2) provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition including the effect of disability as it may naturally extend into the future.

It is well settled that this statutory framework commands the Commissioner to translate disability in a medical sense into economic disability within the meaning of the Act. *Williams v. Donovan,* E.D.La. 1964, 234 F.Supp. 135, *aff'd* 367 F.2d 825.

Appellants contend that when the Commissioner found they were partially and permanently disabled, he was required to enter an order providing for permanent compensation payments. Their position is spurious. The Com-

missioner cannot find that permanent physical disability has resulted in permanent economic disability unless he concludes that wage-earning capacity will always be adversely affected by the physical impairment. Stated differently, the statute does not allow an award for permanent-partial disability, aside from scheduled disabilities, unless there has been a loss of wage-earning capacity. This can be seen in the statutory definition of "disability"; "incapacity because of injury to earn [thereafter] the wages which the employee was receiving at the time of injury." 33 U.S.C. §902(10); *Miller v. O'Hearne,* D. Maryland 1960, 181 F.Supp. 105, 107.

Appellant's second attack on the compensation award seems to be that though wage-earning capacity is relevant, the present order is not in accordance with law because the Commissioner employed an improper standard in determining their capacity. They argue that the Commissioner found no decrease in working capacity solely because after-injury wages were higher. As will be seen, it is only to the finding on Tugwell's claim that this objection is pertinent. As to Tugwell, the Commissioner found that as a consequence of his record of substantially increased earnings since November 2, 1958 and in view of his positively demonstrated ability to earn wages in excess of his average weekly wage prior to injury, he sustained no loss of wage-earning capacity after November 1, 1958. Appellants say the Commissioner applied an improper standard under *Burley Welding Works v. Lawson,* 5th Cir. 1944, 141 F.2d 964. There we remarked that an "employee who has sustained a permanent-or temporary-partial disability and who returns to work at the same or higher wages nevertheless may be entitled to compensation if he has sustained a decrease in "wage-earning capacity." *Id.* at 966.

Examination of Section 908(h) confirms that *Burley* is inapposite. The statutory scheme shows that the Commissioner is to base his finding of wage-earning capacity on the employee's subsequent wage record unless he determines that these actual earnings do not fairly and reasonably represent wage-earning capacity. All *Burley* adds to this statutory guideline is that these higher wages are not always determinative. *See California Ship Service Co. v. Pillsbury,* 9th Cir. 1949, 175 F.2d 873, 877; *Bethlehem Steel Company, Shipbuilding Div. v. Traynor,* D. Maryland 1965, 239 F.Supp. 749. The rule-of-thumb for the Commissioner is therefore that "[w]hile the employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so." *Travelers Insurance Co. v. McLellan,* 2d Cir. 1961, 288 F.2d 250, 251. This rule also comports with the purpose of section 908(h) which is to allow the Commissioner to consider other factors besides subsequent wages in situations where the employee had no actual earnings after injury or his actual earnings did not reflect his capacity. Furthermore, since these wages are clearly the most concrete data in the compensation calculus, there are strong practical reasons for having the Commissioner begin his analysis with them. After examining the record and noting that the Commissioner spoke in terms of "ability to earn wages," we are persuaded that he focused on the capacity issue and merely used the wages as a guideline. We have found only one decision to the effect that the comparison of earnings before and after injury is not particularly significant. There the court was convinced that the injury would adversely affect the worker's future employment possibilities. *See Lawrence v. Norfolk Dredging Co.,* 4th Cir. 1963, 319 F.2d 805. Surely Tugwell's promotion and his increase in salary from $10,790.41 in 1959 to $14,-

926.99 in 1964 negate that possibility here. Appellants' only rebuttal is that if the Commissioner considered post-injury wages reflective of Tugwell's earning capacity, he should have entered a specific finding that these wages were a fair and reasonable indication of this capacity. Because we are convinced that the only reasonable inference which can be drawn from the findings is that the Commissioner considered the actual wages as fairly and reasonably representative of Tugwell's wage-earning capacity, we can find no reversible error in the failure to make findings in the language used by appellants. *Cf. Alexander v. Leavey*, 5th Cir. 1966, 370 F.2d 536, 537.

Finally, the wording of the finding as to Welch renders these arguments about standards for computing capacity inapplicable. The Commissioner considered all the factors enumerated in section 908(h)(2) and clearly held that Welch suffered no loss of wage-earning capacity from his injury.

AFFIRMED.

APPENDIX B

ORDERS ON SEVERAL MOTIONS

7-15-66: While C.A. No's 65-H-760, 841 and 844 have been consolidated under C.A. No. 65-H-760, Motions applicable to each case shall be treated separately for convenience.

Re: C.A. 65-H-760: As this Court finds substantial evidence in the record to support the defendant Deputy Commissioner's compensation Order of 10-13-65, Deft. Commissioner's Motion for Summary Judgment is granted. Plff's motion for judgment is denied. See: *Miller v. O'Hearne,* 181 F.Supp. 105 (D. Md. 1960), Alexander v. Leavey (CA 65-H-231, S.D. Tex. 11-18-65). Deft Stevedore and Comp. Carrier's Motion to dismiss Welch's appeal is moot due to the action taken above.

Re: C.A. 65-H-844: As this Court finds substantial evidence in the record to support the defendant Deputy Commissioner's Comp. Order of 11-4-65, deft Deputy Commissioner's Motion for Summary Judgment is granted. Plff's motion for Summary Judgment is denied. See: *Miller v. O'Hearne, supra, Alexander v. Leavey, supra.* Deft's Stevedore and Comp. Carrier's motion to dismiss Tugwell's appeal is *moot* in view of the granting herein of the defendant Deputy Commissioner's motion for Summary Judgment.

Notice.

J.N."